

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 048 of 2021

STATE

V

SARWAN KUMAR SINGH

Counsel : Ms. S. Swastika for the State.
: Mr. M. Kumar and Ms. R. Prasad for the
Accused.

Dates of Hearing : 03, 04, 05 June, 2024
Closing Speeches : 06 June, 2024
Date of Judgment : 07 June, 2024

JUDGMENT

(The name of the complainant is suppressed she will be referred to as "K.S")

1. The Director of Public Prosecutions charged the accused by filing the following information dated 27th April, 2021:

FIRST COUNT

(Representative Count)

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

SARWAN KUMAR SINGH, between the 1st day of February, 2019 and the 28th day of February, 2019 at Lautoka in the Western Division, unlawfully and indecently assaulted “K.S”, by fondling the breast of the said “K.S”.

SECOND COUNT

(Representative Count)

Statement of Offence

RAPE: Contrary to section 207 (1), (2) (b) and (3) of the Crimes Act 2009.

Particulars of Offence

SARWAN KUMAR SINGH, between the 1st day of February, 2019 and the 28th day of February, 2019 at Lautoka in the Western Division, penetrated the vagina of “K.S”, with his finger, a child under the age of 13 years.

THIRD COUNT

Statement of Offence

RAPE: Contrary to section 207 (1), (2) (a) and (3) of the Crimes Act 2009.

Particulars of Offence

SARWAN KUMAR SINGH, between the 1st day of February, 2019 and the 28th day of February, 2019 at Lautoka in the Western Division, had carnal knowledge of “K.S”, a child under the age of 13 years.

FOURTH COUNT

(Representative Count)

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

SARWAN KUMAR SINGH, between the 1st day of March, 2020 and the 31st day of March, 2020 at Lautoka in the Western Division, unlawfully and indecently assaulted “K.S”, by fondling the breast of the said “K.S”.

FIFTH COUNT

(Representative Count)

Statement of Offence

RAPE: Contrary to section 207 (1), (2) (b) and (3) of the Crimes Act 2009.

Particulars of Offence

SARWAN KUMAR SINGH, between the 1st day of March, 2020 and the 31st day of March, 2020 at Lautoka in the Western Division, penetrated the vagina of “K.S”, with his finger, a child under the age of 13 years.

SIXTH COUNT

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

SARWAN KUMAR SINGH, between the 1st day of March, 2020 and the 31st day of March, 2020 at Lautoka in the Western Division, unlawfully and indecently assaulted “K.S”, by sucking the breast of the said “K.S”.

SEVENTH COUNT

Statement of Offence

RAPE: Contrary to section 207 (1), (2) (a) and (3) of the Crimes Act 2009.

Particulars of Offence

SARWAN KUMAR SINGH, between the 1st day of March, 2020 and the 31st day of March, 2020 at Lautoka in the Western Division, had carnal knowledge of “K.S”, a child under the age of 13 years.

2. In this trial, the prosecution called three witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer for count one (sexual assault), count two (rape), count four (sexual assault) and count seven (rape). There was no evidence in respect of counts 3, 5, and 6,

BURDEN OF PROOF AND STANDARD OF PROOF

3. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. An accused is presumed to be innocent until he or she is proven guilty. The standard of proof is one of proof beyond reasonable doubt.

4. The accused is charged with more than one offence, the evidence in respect of each offence will be considered separately from the other if the accused is guilty of one offence, it does not mean that he is guilty of the others as well. This also applies with the findings of not guilty.

ELEMENTS OF THE OFFENCE

SEXUAL ASSAULT

5. To prove counts one, and four the prosecution must prove the following elements of the offences of sexual assault beyond reasonable doubt:
 - (a) The accused;
 - (b) Unlawfully and indecently;
 - (c) Assaulted the complainant by touching and/or fondling her breast with his hand.
6. The first element of the offence of sexual assault is concerned with the identity of the person who allegedly committed these offences.
7. The words “unlawfully” and “indecently” in respect of the second element of the offences of sexual assault means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such conduct indecent.
8. The final element of assault is the unlawful use of force on the complainant by the accused by touching and /or fondling her breast with his hand.

In this regard this court has to consider:

- (a) whether the force used in touching and/or fondling her breast in the context of what the accused was doing to the complainant sexual in nature; and
 - (b) if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, was in fact sexual in nature.
9. In this trial, the accused has denied committing the offences of sexual assault as alleged. It is for the prosecution to prove beyond reasonable doubt that it was the accused, who had unlawfully and indecently assaulted the complainant by touching and/or fondling her breasts with his hand.
10. If this court is satisfied beyond reasonable doubt that the prosecution has proved all the elements of the offences of sexual assault as explained above, then this court must find the accused guilty. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offences of sexual assault, then this court must find the accused not guilty.

RAPE

11. To prove counts two and seven the prosecution must prove the following elements of the offences of rape beyond reasonable doubt:
- (a) The accused;
 - (b) Penetrated the vagina of the complainant with his finger and penis respectively;
 - (c) The complainant was below the age of 13 years.

12. The slightest of penetration of the complainant's vagina by the accused's finger and penis is sufficient to satisfy the act of penetration. As a matter of law a person under the age of 13 years does not have the capacity to consent. In this case, the complainant was 12 years at the time of the alleged offending and therefore the consent of the complainant is not an issue in regards to these counts.
13. The first element of the offence is concerned with the identity of the person who allegedly committed these offences.
14. The second element is the act of penetration of the complainant's vagina by the finger and penis.
15. The final element of the offence is the age of the complainant. It is not in dispute that the complainant was 12 years during the period of the allegation which establishes that she was below the age of 13 years at the time of the alleged incidents.
16. In this trial, the accused denied committing the offences of rape he is charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his finger and penis as alleged.
17. This court must be satisfied that the prosecution has proved all the elements of the offences of rape beyond reasonable doubt in order for this court to find the accused guilty. If on the other hand, this court has a reasonable doubt with regard to any of those elements concerning the offences, then this court must find the accused not guilty.
18. As a matter of law, I have to direct myself that offences of sexual nature as in this case do not require the evidence of the complainant to be

corroborated. This means, if this court is satisfied with the evidence given by the complainant and accepts it as reliable and truthful then this court is not required to look for any other evidence to support the account given by the complainant.

ADMITTED FACTS

19. In this trial, the prosecution and the defence have agreed to certain facts titled as agreed facts. These facts are part of the evidence and I have accepted these agreed facts as accurate, truthful and proven beyond reasonable doubt.
20. I will now remind myself of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. I will summarize the important features for consideration and evaluation in coming to my final judgment in this case.

PROSECUTION CASE

21. The complainant informed the court that the accused is her biological father and she is the youngest in the family. The complainant's mother died when she was an infant her date of birth is 30th December, 2007. The complainant is educated up to form 4 the birth certificate of the complainant was marked and tendered as prosecution exhibit no. 1.
22. In 2019 the complainant was staying with the accused and her two sisters Nandini and Riya. The complainant recalled one day in February, 2019 she was in her bedroom alone when her father came inside. When

she saw her father she got scared because she did not know what he wanted hence she asked "*what happened*".

23. The complainant was standing beside the chair the accused came and stood behind her and touched her breast with his hand from over her clothes. When the accused did this the complainant said she felt guilty, embarrassed and angry she did not do anything because she was told by the accused to "*shut up*". At this time the complainant's sisters had gone to town.
24. Thereafter the accused slowly took his hand towards her private part he got her legs apart and poked the place where she urinates from over her undergarments. Again the complainant felt guilty, embarrassed and angry. The complainant did not do anything because she was scared. According to the complainant the accused did all of the above to her on many occasions in the month of February, 2019.
25. The complainant further stated that in March 2020 again when she was alone at home the accused came into her bedroom. The house had two bedrooms, one bedroom was occupied by the accused and the other one by the complainant and her two sisters Riya and Nandini.
26. When the accused came inside her bedroom she was lying on her bed face up studying, the accused came beside the bed and started touching her breast from inside her clothes the complainant said "*what are you doing father,*" the response was "*be quiet*". The complainant felt guilty, embarrassed and angry when questioned where were her sisters the complainant said they had gone to town. According to the complainant the accused did this to her on many occasions in March, 2020.

27. After this the accused removed the complainant's clothes making her naked spread her legs and then inserted his penis into the place where she urinates from. The complainant felt guilty, embarrassed and angry, she was pushing the accused away but could not because he was holding her tight. The accused told her to be quiet since the complainant felt pain she said "*please don't*" before leaving the accused said if she told anyone about what he did to her he will kill and bury her. The complainant wanted to tell everyone but she could not for which she felt bad. When she was cleaning herself she saw blood on her bed.
28. It was in the year 2021 the complainant told her sister Riya that the accused had sexually abused her by touching her breast and the place where she urinates. The complainant was medically examined after the police came to the house of the complainant as a result of a commotion. The complainant told the doctor about what the accused had done to her and to tell her if she was pregnant. The complainant's eldest sister Shayal was present during the medical examination. The complainant did not continue her studies because people were saying things about her life which made her feel bad and angry, she cried and left school. At one time she tried to commit suicide when she could not succeed she had cut her hands. The complainant recognized the accused in court.
29. In cross examination the complainant agreed that whatever she told the court was the truth. It was the accused who was providing for the family. The two bedrooms had no doors but there were curtains on the doorway of the bedrooms.
30. The complainant agreed that from 1st February, 2019 till end of 2021 the accused, complainant's step mother, step mother's daughter Rosie and Rosie's infant child were living in the house. However, it was not true

that Rosie was always at home recovering from child birth in 2019. When questioned where Rosie was, the complainant said Rosie was not staying at her house but only came when asked to come over.

31. The complainant agreed that Rosie had a bed in her bedroom with Riya and her but Rosie was not in the bedroom at the time of the incidents. The complainant agreed that she had told the court the accused in 2019 had put his fingers at the place where she used to “pee” from on top of her clothes.
32. The complainant was referred to her police statement dated 1st March, 2021, line 4 which was read as:

“Also he put his hand inside my panty and inserted his finger inside my vagina and it was painful.”
33. When questioned which version was correct the complainant stated that what she told the court was correct. Upon further questioning the complainant stated that it was wrong to say that the accused had not penetrated her in her “pee” area during the incident of February 2019. The complainant agreed that from February, 2019 till 28th February, 2021 she had many opportunities to lodge a complaint against the accused but she did not because she was threatened by the accused.
34. When it was suggested to the complainant that on 26th and 27th February, 2021 when her sister Riya had asked her whether the accused had sexually abused her the complainant’s response was no the accused had not sexually abused her. The complainant maintained that this was not correct since she had told Riya everything the accused had done to her.

35. On 28th February, 2021 the complainant did not tell the police she had been sexually assaulted by the accused because the accused had threatened her that he will kill her if she told anyone. The complainant agreed that she had informed Dr. Monisha that the last sexual assault by the accused was in December, 2020.
36. The complainant denied that she had made a false allegation against the accused. She said *“he had penetrated and my life has been spoilt here at that time I was a child.”* The complainant denied fabricating the allegations with her elder sister Shayal due to an allegation of theft raised against her by the accused.
37. Riya Singh the sister of the complainant informed the court that in the year 2019, she was living with the accused her father, two sisters Nandini and the complainant and Nafiza Khatoon her step mother who had left their house in early 2019 after staying for one month.
38. In March 2021, the complainant told the witness that their father was touching her private part and having sex with her. Upon hearing this, the witness stated to cry. According to the witness this conversation happened after the complainant was seen by the doctor at the hospital but when the witness had asked the complainant at home whether their father was abusing her sexually the complainant had said no.
39. The witness further stated that when the complainant was telling her about what the accused had been doing to her she looked scared. The complainant also told her that the accused had threatened the complainant that if she told anyone he will kill her.

40. In cross examination the witness agreed that on 26th February, 2021 she had asked the complainant whether the accused was sexually assaulting her and the reply from the complainant was no. The witness further stated that when the complainant said no the complainant was scared.
41. On 27th February, 2021 she had asked the complainant if the accused had sex the answer from the complainant was no.
42. The final witness Dr. Monisha Sharma informed the court that she graduated with an MBBS degree from the University of Fiji in 2016. The witness has 7 years of experience as a Medical Practitioner post internship.
43. On 1st March, 2021 the witness had examined the complainant at the Lautoka Hospital. According to the witness the patient had informed her that her father was touching her breast, vagina and penetrating her vagina with his penis having sex when her sisters were not at home. The father of the patient had also threatened her not to tell anyone and the last time her father had sexually assaulted her was in December, 2020.
44. Upon vaginal examination the witness came to the following medical findings:
 - a) Hymen was not intact;
 - b) No vaginal discharge was noted;
 - c) No laceration on the thigh.
45. The conclusion of the witness was that the physical examination findings were inconclusive since there can be several ways by which a hymen will not be intact such as sexual intercourse, certain sports, cycling, riding a bicycle etc.

46. According to the witness she had observed that the complainant was scared, holding her sister's dress, will think for some time before answering as if someone was threatening her not to say anything. The Fiji Police Medical Examination Form of the complainant was marked and tendered as prosecution exhibit no. 2.
47. In cross examination the witness agreed that she did not specialize in gynaecology. The witness stated in respect of hymen there can be no tear if it was not intact that's it.
48. In re-examination the witness stated that although she was not a gynaecologist during her MBBS course she had done gynaecology and during her internship she had received practical training in the field of gynaecology under the supervision of consultant doctors.

RECENT COMPLAINT DIRECTION

49. Complainants of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A complainant's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.
50. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for this court to determine what weight is to be given to the fact that on 1st March, 2021 the complainant told Dr.

Sharma the accused had sexually abused her by touching her breast, vagina and had sexual intercourse with her when she was alone at home.

51. Furthermore, after the medical examination the complainant told her sister Riya the accused was touching her private part and having sex with her.
52. This is commonly known as recent complaint evidence. The evidence given by Dr. Sharma and Riya is not evidence of what actually happened between the complainant and the accused since Dr. Sharma and Riya were not present and they did not see what had happened.
53. This court is, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant was in a vulnerable and helpless situation since she was under the care and control of the accused the sole bread winner of the family, however, in 2021 the complainant was able to tell the doctor and her sister Riya about what the accused had been doing to her.
54. The prosecution further states that the accused continued his unlawful conduct on the complainant on several occasions. The prosecution is also asking this court to consider the fact that the complainant was 12 years old when the abuse was happening to her. Despite the delay the complainant was able to recall and relay relevant and important information about the conduct of the accused to the doctor and Riya shows that the complainant is likely to be truthful.
55. On the other hand, defence says the complainant made up false allegations against the accused. She gave one version to the doctor another version to her sister Riya and a different version in court. The

defence also states that this court should consider that there are different versions which shows the complainant was not consistent hence she was making up a story against the accused and therefore she should not be believed.

56. It is for this court to decide whether the evidence of recent complaint helps this court to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. It is for this court to decide whether the complainant is reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.

DIRECTION ON EXPERT EVIDENCE

57. This court has heard the evidence of Dr. Monisha Sharma who had been called as an expert on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide the court with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that this court should see it in its proper perspective. The medical report of the complainant is before this court and what the doctor said in her evidence as a whole is to assist this court.
58. An expert witness is entitled to express an opinion in respect of his or her findings and I am entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. When coming to my conclusion about this aspect of the case this court should bear in mind that if, having given the matter careful consideration, this court does not accept the evidence of the expert it does not have to act upon it.

Indeed, this court does not have to accept even the unchallenged evidence of the doctor.

59. The evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to this court in reaching its decision, this court must reach a decision having considered the whole of the evidence.
60. This was the prosecution case.

DEFENCE CASE

61. At the end of the prosecution case, the accused was explained his options. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination. This court must also consider his evidence and give such weight as is appropriate.
62. The accused informed the court that he has understood the charges filed against him, however, all the allegations are a lie. The complainant lied because she had stolen his \$300.00 from his house.
63. The accused is a taxi driver he drives 7 days a week from 6.30 am till 11pm and he does not go home between these times. He stated that he clearly recalled between 1st and 28th February, 2019 and 1st and 31st March, 2020 he did not go home between 6.30 am and 11pm.
64. According to the accused he gets his breaks for 1 to 2 hours in between his taxi trips. He feels bad that his daughter has made false allegations against him. He has worked hard to earn for his daughters, after his first wife passed on he was caring for all his daughters doing everything for them and yet these false allegations have been made against him.

65. In cross examination the accused agreed that he was the sole breadwinner of the family and a single parent to his daughters. He had kept the complainant disciplined and he had authority over her. His expectation was for the complainant to listen to him.
66. The accused stated that his second wife Nafiza had left his house on 30th January, 2019. The accused did not agree that in February, 2019 the complainant used to be alone at home he stated that all his daughters would go to town together. When it was put to the accused that during his caution interview he had told the police that the complainant used to stay at home while his other daughters went to town the accused stated that he told the police that the complainant would also go to town with her sisters.
67. The accused agreed that he told the court he never came home during the day. When it was put to the accused that he told the police in his caution interview that he used to come home during the daytime, the accused denied this. When he was told that he had signed his caution interview and the answer in the caution interview were his, the accused changed his position to say *“only when my wife Nafiza Khatoon would call me to come and drop then I would come home.”*
68. The accused agreed he used to go home sometimes during the day but not all the time. In respect of his allegation that the complainant had stolen his \$300.00 the accused stated that he did not see this but he knows his children stole his money.
69. The accused maintained that the complainant was stealing money from him and when he confronted her she made these false allegations against

him. The accused denied all the allegations raised against him by the complainant he said that he did not do anything, the complainant lied in court.

70. This was the defence case.

PREVIOUS INCONSISTENT STATEMENT

71. This court also directs its mind to the fact that the defence counsel during cross examination of the complainant and the state counsel during the cross examination of the accused had questioned these witnesses about an inconsistency in her police statement and his caution interview respectively which they had given to the police when facts were fresh in their minds with their evidence in court.

72. This court is allowed to take into consideration the inconsistency or omission between what these witnesses told the court and their police statement and caution interview when considering whether these witnesses were believable and credible. However, the police statement and caution interview are not evidence of the truth of its contents.

73. It is obvious that passage of time can affect one's accuracy of memory. Hence it cannot be expected for every detail to be the same from one account to the next.

74. If there is any inconsistency or omission, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the witness. If it is significant, then it is for this court to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, then this court may conclude

that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for this court to decide to what extent that influences the reliability of the witness evidence.

ANALYSIS

75. The prosecution states that the complainant and the accused are known to each other. The complainant lived with her father the accused and her two sisters Riya and Nandini and she is the youngest in the family.
76. In the year 2019 the complainant was 12 years of age. The prosecution alleges that the accused took advantage of the complainant and sexually abused her on a number of occasions in February, 2019 and again in March, 2020. The abuses were carried out by the accused when the complainant's sisters went to town and she was alone at home.
77. One day in February, 2019 the complainant was in her bedroom alone when the accused went inside her bedroom. When she saw her father she got scared because she did not know what he wanted.
78. The accused without saying anything went and stood behind the complainant who was also standing. He touched her breasts with his hand from over her clothes. The complainant did not like what the accused had done. As a result she felt embarrassed, guilty and angry at what her father was doing to her.
79. Thereafter the accused slowly took his hand towards her private part he got her legs apart and poked his fingers in the place where she urinates from over her undergarments. Again the complainant felt embarrassed, guilty and angry she did not do anything because she was scared.

According to the complainant the accused did the above to her on many occasions in February, 2019.

80. In March 2020 again when the complainant was alone at home the accused went into her bedroom at this time the complainant was lying on her bed face up. The accused went beside her bed and started touching her breast by putting his hand inside her clothes. The complainant did not like what the accused was doing she felt embarrassed, guilty and angry. According to the complainant the accused did this to her on many occasions in March.
81. After this the accused removed the complainant's clothes making her naked spread her legs and then inserted his penis into the place where she urinates from and had sexual intercourse with her. The complainant again felt embarrassed, guilty and angry, she was pushing the accused away but she could not do so because he was holding her tight. Before leaving the accused threatened the complainant that if she told anyone he will kill and bury her.
82. It was on 1st March 2021 the complainant was medically examined and she told the doctor that her father the accused was touching her breast, vagina and penetrating her vagina with his penis having sex with her when her sisters were not at home. The accused had also threatened her not to tell anyone about what he had done to her. After the medical examination the complainant also told her sister Riya about what the accused had done to her.
83. On the other hand, the defence says the allegations are false initiated against the accused by the complainant and her elder sister Shayal. He did not do anything to the complainant as alleged. What the complainant

narrated in court was not possible and/or probable and therefore she should not be believed.

84. The defence is asking this court to consider the fact that the complainant had stolen the accused's hard earned money from his house. When he confronted the complainant she concocted a false story against him in a bid to divert attention away from her and onto the accused.
85. In respect of Riya's evidence the defence says this witness was honest in telling the court that the complainant upon her questioning had denied the accused had sexually assaulted her anytime. So what changed when the complainant went to the hospital? The answer is simple the complainant in the company of her elder sister Shayal made a false story against the accused and this was the only way the complainant could get away from the allegation of theft. This is exactly what has happened here. The police did not waste any time and they arrested the accused from his house. The complainant has laid a trap against the accused by making these baseless allegations against him.
86. The defence is also asking this court not to believe the recent complaint evidence of Dr. Sharma and Riya. The complainant was not consistent in relaying her complaint to the doctor and Riya. The complainant gave one version to the doctor and another version to Riya and a totally different version in court. What the complainant told the doctor was that the last time the accused sexually assaulted her was December, 2020 when there was no evidence before the court of this. The complainant did not give any such detail to Riya. The complainant told the court about the penetration of her urinal area which is not what she told the doctor. The inconsistency in what the complainant told the court and what she told the doctor and Riya affects the credibility of the complainant.

87. The defence further submits that the complainant was not restrained by the accused any time she was a free agent going to school, her grandparents house was close by and yet it took her 2 years to report the matter to the police is unacceptable and reeks of suspicion.
88. Finally, the defence submits that what the complainant told the court does not make sense and is riddled with doubt. The defence is asking this court not to believe the complainant who is furthering her vested interest to avoid the issue of theft and therefore she has a motivation to see that the accused is put away and therefore she should not be believed.

DETERMINATION

89. At the outset I would like to mention that the evidence of the complainant not related to the information filed has been disregarded completely. I would like to once again remind myself that the burden to prove the accused guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused. Even if I reject the version of the defence still the prosecution must prove this case beyond reasonable doubt.
90. In this case, there are two different versions, one given by the prosecution and the other by the defence. This court must consider all the evidence adduced to decide whether the prosecution has proven beyond reasonable doubt that the accused committed the offences alleged. It is not for this court to decide who is acceptable between the complainant and the accused.

91. This court has kept in mind the following factors when determining the credibility and reliability of a witness such as promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in court [and the evidence of corroboration where it is relevant] see *Matasavui v State* [2016] FJCA 118; AAU0036.2013 (30 September 2016, *State v Solomone Qurai* (HC Criminal - HAC 14 of 2022).
92. Brennan J in *Liberato and Others v The Queen* ((1985) [1985] HCA 66; 159 CLR 507 at 515 has discussed the appropriate approach to be taken where there are conflicting versions of evidence given by the prosecution and the defence witnesses. Brennan J held that:

“When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question; who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issue which it bears the onus of proving. The jury must be told that; even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue. His Honour did not make clear to the jury, and the omission was hardly remedied by acknowledging that the question whom to believe is “a gross simplification.”

93. This court has also taken into account the observations made by the Court of Appeal in *Rokocika v The State* [2023] FJCA 251; AU0040.2019 (29 November 2023) regarding what the accused told the court. At paragraph 45 the Court of appeal had stated as follows:

The Liberato direction covers three points on the spectrum of belief regarding what the accused has said — positive belief (first aspect), positive disbelief (third aspect), and neither actual belief nor rejection of the accused’s account (second aspect): Park v R [2023] NSWCCA 71 at [102]–[103].

94. I have also kept in mind the observations made by Prematilaka RJA sitting as a single judge of the Court of Appeal in *Josaia Naikalivou vs. The State*, AAU 017 of 2022 (26th March, 2024) at paragraph 9 as follows:

In Murray v The Queen (2002) 211 CLR 193 at 213 [57] Gummow and Hayne JJ, in the High Court of Australia made it clear that it is never appropriate for a trial judge to frame the issue for the jury's determination as involving a choice between conflicting prosecution and defence evidence: in a criminal trial the issue is always whether the prosecution has proved the elements of the offence beyond reasonable doubt. In R v Li (2003) 140 A Criminal R at 288 at 301 it was again held that the issue can never be which of the cases is correct or who of the complainant and the accused is telling the truth. This seems to be what exactly the trial judge had done in the judgment.

95. The defence argument apart from denial is that there was a motive on the part of the complainant to make false allegations against the accused since she had stolen the accused money.

96. In respect of the above contention, I have directed my mind to the *Jovanovic* direction to remind myself that an accused has no burden to prove a motive or reason for a complainant to lie.
97. The Court of Appeal in *Rokocika's* case (supra) from paragraphs 32 to 34 made a pertinent observation in respect of the above as follows:

In R v Jovanovic (1997) 42 NSWLR 520 Sperling J set out a draft direction that emphasised that:

“It would be wrong to conclude that X is telling the truth because there is no apparent reason, in your view, for X to lie. Sometimes it is apparent. Sometimes it is not. Sometimes the reason is discovered. Sometimes it is not. You cannot be satisfied that X is telling the truth merely because there is no apparent reason for X to have made up these allegations. There might be a reason for X to be untruthful that nobody knows about’.

[33] The same has been stated as follows in NSW Criminal Trial Courts Bench Book at 3-625:

‘If the defence case directly asserts a motive to lie on the part of a central Crown witness, the summing-up should contain clear directions on the onus of proof, including a direction that the accused bears no onus to prove a motive to lie and that rejection of the motive asserted does not necessarily justify a conclusion that the evidence of the witness is truthful: Doe v R [2008] NSWCCA 203 at [58]; Jovanovic v R (1997) 42 NSWLR 520 at 521–522 and 535. The jury should also be directed not to conclude that if the complainant has no motive to lie then they are, by that reason alone, telling the truth: Jovanovic v R at 523.

[34] NSW Criminal Trial Courts Bench Book also states that:

‘A motive to lie or to be untruthful, if it is established, may “substantially affect the assessment of the credibility of the witness”: ss 103, 106(2)(a) *Evidence Act 1995. Where there is evidence that a Crown witness has a motive to lie, the jury’s task is to consider that evidence and to determine whether they are nevertheless satisfied that the evidence given is true: South v R [2007] NSWCCA 117 at [42]; MAJW v R [2009] NSWCCA 255 at [31].’*

98. There is no dispute that the accused is the father of the complainant and both were living in the same house. Before proceeding any further it is important to resolve the issue of whether the evidence of the complainant that the accused had penetrated his finger and penis into the place where she urinates from meets the requirements of section 207 (2) (b) of the Crimes Act 2009. To satisfy section 207 of the Crimes Act the accused must penetrate the vulva, vagina or anus of the complainant.
99. At the time of the allegation the complainant was 12 years of age and educated up to form 4. At the time of giving evidence the complainant is 16 years of age having left school some 3 years ago in 2021. From the evidence before the court there is undisputed evidence of the doctor that the complainant had told her the accused was touching her breast, vagina and penetrating her vagina brings me to the inescapable conclusion that the complainant meant the accused had penetrated her vagina with his finger and penis on different occasions. The complainant also told the court that she had specifically asked the doctor to tell her whether she was pregnant or not points to the fact that the complainant was talking about the vagina but had used a different term to describe it.
100. Considering the age and passage of time including the level of the complainant’s education I have no doubt that the complainant used the

incorrect terminology for vagina. It appears to me that the complainant was confused and therefore she was unable to explicitly explain the biological/medical term of the female reproductive organ which is understandable and acceptable given her age and education level. Nevertheless the complainant had expressed herself clearly when she was communicating with the doctor who had examined her. The medical distinction is not relevant in view of the evidence adduced.

101. The Court of Appeal in *Vilikesa Volau v State* [2017] FJCA 51; AU0011.2013 (26 May 2017) from paragraphs 13 to 15 made a pertinent observation in respect of the above as follows:

12. Before proceeding to consider the grounds of appeal, I feel constrained to make some observations on a matter relevant to this appeal which drew the attention of [the] Court though not specifically taken up at the hearing. There is no medical evidence to confirm that the Appellant's finger had in fact entered the vagina or not. It is well documented in medical literature that first, one will see the vulva i.e. all the external organs one can see outside a female's body. The vulva includes the mons pubis ('public mound' i.e. a rounded fleshly protuberance situated over the public bones that becomes covered with hair during puberty), labia majora (outer lips), labia minora (inner lips), clitoris, and the external openings of the urethra and vagina. People often confuse the vulva with the vagina. The vagina, also known as the birth canal, is inside the body. Only the opening of the vagina (vaginal introitus i.e. the opening that leads to the vaginal canal) can be seen from outside. The hymen is a membrane that surrounds or partially covers the external vaginal opening. It forms part of the vulva, or external genitalia, and is similar in structure to the vagina.

13. Therefore, it is clear one has to necessarily enter the vulva before penetrating the vagina. Now the question is whether in the light of inconclusive medical evidence that the Appellant may or may not have penetrated the vagina, the count set out in the Information could be sustained. It is a fact that the particulars of the offence state that the Appellant had penetrated the vagina with his finger. The complainant stated in evidence that he 'poked' her vagina which, being a slang word, could possibly mean any kind of intrusive violation of her sexual organ. It is naïve to believe that a 14 year old would be aware of the medical distinction between the vulva and the vagina and therefore she could not have said with precision as to how far his finger went inside; whether his finger only went as far as the hymen or whether it went further into the vagina. However, this medical distinction is immaterial in terms of section 207(b) of the Crimes Act 2009 as far as the offence of rape is concerned.

14. Section 207 (b) of the Crimes Act 2009 as stated in the information includes both the vulva and the vagina. Any penetration of the vulva, vagina or anus is sufficient to constitute the actus reus of the offence of rape. Therefore, in the light of Medical Examination Form and the complainant's statement available in advance, the prosecution should have included vulva also in the particulars of the offence.

Nevertheless, I have no doubt on the evidence of the complainant that the Appellant had in fact penetrated her vulva, if not the vagina. Therefore, the offence of rape is well established. It is very clear that given the fact that her body had still not fully developed at the age of 14, cries out of considerable pain of such penetration would have drawn the attention of the Appellant's wife to the scene of the offence.

102. After carefully considering the evidence adduced by the prosecution and the defence, I believe the evidence of the complainant as truthful and reliable she gave a comprehensive account of what the accused had done to her. She was also able to withstand cross examination and was not discredited as to the main version of her allegations.
103. The complainant was coherent and articulate about what she had encountered and I have no doubt in my mind that she told the truth in court. Her demeanour was consistent with her honesty.
104. Experience has shown that individuals differ in terms of how they react towards what is happening to him or her. Some display obvious signs of distress and some not. The fact that the complainant did not shout or yell or immediately tell anyone was because the alleged perpetrator was her father who had authority and control over her. The age of the complainant at the time is also an important consideration in this regard. The behaviour of the accused in the bedroom and the threat by the accused in my considered judgment had instilled fear in the complainant.
105. For this reason, it was only when the complainant was away from home in the hospital with the doctor that she was able to fearlessly tell the doctor about what the accused had done and thereafter she told her sister Riya is a natural consequence of events. The fact that the complainant did not tell Riya in the first instance at home cannot be taken against the complainant because of her fear of the accused. This is supported by what Riya told the court in cross examination that the complainant was scared when she said the accused had not done anything to her. I also observed that the complainant had a strong view against the conduct of the accused and she had expressed herself clearly

about what the accused had done. In this case the conclusion of the doctor that her medical findings were inconclusive does not affect the prosecution case bearing in mind the reasons given by the doctor that there are many ways in which a hymen can be broken.

106. I reject the defence assertion that the complainant had a motive to falsely to frame the accused is far-fetched and an attempt by the accused to divert attention away from the allegations. It is difficult to accept why the complainant would falsely implicate the accused when in his evidence the accused admitted that he did not see the complainant steal his money. It is obvious to me that the accused is making a baseless claim against the complainant merely on an assumption. The allegation of the accused lacks authenticity in absence of any specific details of where the money was kept, who knew about the money, when was it stolen and what steps he took to get to the culprit and so on.

LATE REPORTING

107. Furthermore, there is an issue of late reporting by the complainant to the police. The allegations started in 2019 continued in 2020 but was reported at the end of February, 2021. There is a delay of about 2 years from 2019. In law the test to be applied in such a situation is known as the totality of circumstances test. The Court of Appeal in *State v Serelevu (2018) FJCA 163; AAU 141 of 2014 (4th October, 2018)* had explained this issue as follows:

*“[24] In law the test to be applied on the issue of the delay in making a complaint is described as “the totality of circumstances test”. In the case in the United States, in **Tuyford** 186, N.W. 2d at 548 it was decided that:-*

“The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is whether the complaint was made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay.”

“[26] However, if the delay in making can be explained away that would not necessarily have an impact on the veracity of the evidence of the witness. In the case of Thulia Kali v State of Tamil Naidu; 1973 AIR.501; 1972 SCR (3) 622:

“A prompt first information statement serves a purpose. Delay can lead to embellishment or after thought as a result of deliberation and consultation. Prosecution (not the prosecutor) must explain the delay satisfactorily. The court is bound to apply its mind to the explanation offered by the prosecution through its witnesses, circumstances, probabilities and common course of natural events, human conduct. Unexplained delay does not necessarily or automatically render the prosecution case doubtful. Whether the case becomes doubtful or not, depends on the facts and circumstances of the particular case. The remoteness of the scene of occurrence or the residence of the victim of the offence, physical and mental condition of persons expected to go to the Police Station, immediate availability or non-availability of a relative or friend or well wisher who is prepared to go to the Police Station, seriousness of injuries sustained, number of victims, efforts made or required to be made to provide medical aid to the injured, availability of transport facilities, time and hour of the day or night, distance to the hospital, or to the Police Station, reluctance of people generally to visit a Police Station and other relevant circumstances are to be considered.”

108. Firstly, I would like to state that the accused was a person of authority in the house he was the father of the complainant and both were living in the same house.
109. Secondly, the accused was the sole breadwinner of the family and he had told the complainant not to do anything but to remain quiet and his subsequent threat that if she told anyone he would kill and bury her in my considered judgment had instilled fear in the mind of the complainant who did not tell anyone about what the accused was doing to her until she could not take it anymore.
110. The late reporting in my view was beyond the control of the complainant she was afraid of the accused and when the opportunity presented itself the complainant opened up and expressed herself to the doctor when she was away from home.
111. I accept that the complainant was a victim of circumstances which resulted in delayed complaint to the police. In addition to the above, the complainant was scared of the accused hence she did not tell anyone cannot be ignored as well. Considering the age of the complainant and the prolonged abuse on the complainant it took a while for the complainant to gather the courage to speak out which she eventually did.
112. The delay of 2 years is reasonable considering the circumstances of the complainant. Prematilaka, RJA sitting as a single judge in the Court of Appeal in *Ram Krishna vs. The State, criminal appeal no. AAU 123 of 2022, (12 April, 2024)* made an important observation about the jurisprudence and the reasoning behind late reporting from paragraph 28 to 33 as follows:

[28] The Doctrine of Recent Complaint: Anti-Feminist Narratives in Evidence Law by Eoin Jackson says:

As noted by the academic Wigmore, the origin of the doctrine of recent complaint lies in the medieval expectation that a victim of rape would raise a 'hue and cry' in order to make the community aware that a violation had occurred. Stanchi, writing in the Boston College Law Review, discusses how this can be linked to the historical mistrust of female witnesses, with the promptness of the complaint being equated to an alleviation of some of this mistrust..... For example, Heffernan has noted how the doctrine continues to operate on the assumption that a victim will report an incident of sexual assault as soon as is reasonably possible. This ignores a myriad of factors a victim may be feeling, such as fear, humiliation, and intimidation..... A personal connection to the abuser will naturally hinder victims from promptly reporting the incident, given they may need to weigh up the effect reporting the assault has not just on them, but on the relationships within their broader social and familial circle.....The outdated perception that a victim will immediately report a traumatic incident does not take into account the various psychological and personal factors at play and other complexities, in particular those that arise where the victim is familiar with their abuser..... While it is logical for a victim to consult with someone they perceive to be knowledgeable about the matter at hand, yet the doctrine of recent complaint ignores this in favour of a blanket presumption that an immediate disclosure will be made..... The recent complaint doctrine strictly focuses on the idea of reporting as soon as reasonably possible in the context of the mind-set of the victim, as opposed to enquiring as to whether there are any excuses that would justify an otherwise 'unreasonable delay'.

[29] According to Jackson in recent times, the doctrine has been modified to allow for a 'reasonable excuse' justification. This justification would allow

for the prosecution to argue that the victim had a reasonable excuse for delaying in making a complaint. In assessing this excuse, the judge could take into account the emotional state of the woman namely that she was not in a psychological state to make a complaint at the first available opportunity, the nature of the relationship between the accused and victim, and the factual context of the charge itself. It would also account for cases where the victim consults with someone they know prior to making a complaint. This justification would allow for a more inclusive version of the doctrine of recent complaint to be embedded into jurisprudence. It would allow for a version of the doctrine grounded in an emphasis and understanding of the complexities that can arise in the aftermath of a sexual assault. It does not remove the time element, but merely adds nuance sufficient to prevent it from being the determining factor when considering the veracity of testimony.

[30] Australian Law Reform Commission states that: ‘The psychological literature shows that delay is the most common characteristic of both child and adult sexual assault. Significantly in the context of this Inquiry, the ‘predictors associated with delayed disclosure’ reveal differences in reporting patterns depending upon the victim’s relationship with the abuser. For example, where the victim and defendant are related, research suggests there is a longer delay in complaint. Since complainants are routinely cross-examined by defence counsel about delays in complaint in ways that suggest fabrication, ‘it is likely that evidence about a complainant’s first complaint would answer the type of questions that jurors can be expected to ask themselves’.

[31] For example, a Bench of 05 judges of the Supreme Court of Philippines including the Chief Justice in People of the Philippines, Plaintiff-Appellant vs. Bernabe Pareja y Cruz, Accused-Appellant G.R. No. 2021223 quoted the following observations from People v. Gecomio, 324 Phil. 297, 314-315 (1996)⁴ (G.R. No. 182690 - May 30, 2011) in relation to why a rape

victim's deferral in reporting the crime does not equate to falsification of the accusation. 'The failure of complainant to disclose her defilement without loss of time to persons close to her or to report the matter to the authorities does not perforce warrant the conclusion that she was not sexually molested and that her charges against the accused are all baseless, untrue and fabricated. Delay in prosecuting the offense is not an indication of a fabricated charge. Many victims of rape never complain or file criminal charges against the rapists. They prefer to bear the ignominy and pain, rather than reveal their shame to the world or risk the offenders' making good their threats to kill or hurt their victims'

[32] The Court of Appeal in R v D (JA) [2008] EWCA Crim 2557; [2009] Crim LR 591 held that judges are entitled to direct juries that due to shame and shock, victims of rape might not complain for some time, and that 'a late complaint does not necessarily mean it is a false complaint'. The court quoted with approval the following suggested comments in cases where the issue of delay in, or absence of, reporting of the alleged assault is raised by a defendant as casting doubt on the credibility of the complainant. 'Experience shows that people react differently to the trauma of a serious sexual assault. There is no one classic response. The defence say the reason that the complainant did not report this until her boyfriend returned from Dubai ten days after the incident is because she has made up a false story. That is a matter for you. You may think that some people may complain immediately to the first person they see, whilst others may feel shame and shock and not complain for some time. A late complaint does not necessarily mean it is a false complaint. That is a matter for you.'

[33] Thus, as much as a late complaint does not necessarily mean that it is a false complaint, it is nothing but fare for the judges to direct themselves that similarly an immediate complaint does not necessarily demonstrate a true complaint. Thus, a late complaint does not necessarily signify a false

complaint, any more than an immediate complaint necessarily demonstrates a true complaint.

113. Furthermore, I accept the observations of Dr. Sharma and Riya that the complainant was in a disturbed state as a reliable and credible narration of what they had seen. The evidence of these witnesses is also reliable and credible about what the complainant had told them. There was an inconsistency brought up by the defence counsel during the cross examination of the complainant between her evidence and her police statement. However, the inconsistency between the complainant's evidence in court and her police statement is not significant to adversely affect her credibility. In any event the inconsistency does not go to the root of the complainant's evidence.
114. The Court of Appeal in *Mohammed Nadim and another vs. State* [2015] FJCA 130; AAU0080.20 (2 October 2015) had made the following pertinent observations about the above at paragraph 16 as follows:

[16] The Indian Supreme Court in an enlightening judgment arising from a conviction for rape held in Bharwada Bhoginbhai Hirjibhai v State of Gujarat (supra):

“Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; ... (3) The powers of observation differ from person to person. What one may notice, another may

not. It is unrealistic to expect a witness to be a human tape recorder;”

115. Another pertinent observation was also made by the Court of Appeal in *Joseph Abourizk vs. The State*, AAU 0054 of 2016 (7 June, 2019) at paragraph 107 in the following manner about deficiencies, drawbacks and other infirmities in evidence by taking into account the comments made by the Indian Supreme Court in *State of UP v. M K Anthony* (1985) 1 SCC 505:

‘While appreciating the evidence of a witness the approach must be to ascertain whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, then the court should scrutinise the evidence more particularly to find out whether deficiencies, drawbacks and other infirmities pointed out in the evidence is against the general tenor of the evidence. Minor discrepancies on trivial matters not touching the core of the case should not be given undue importance. Even truthful witnesses may differ in some details unrelated to main incident because power of observation, retention and reproduction differ with individuals...’

116. I reject the defence assertion that the complainant had a motive to falsely frame the accused with the allegations because she had stolen the accused’s money is far-fetched and an attempt by the accused to divert attention away from the allegations.

117. At this point I would like to state that I am not convinced that the complainant had given different versions of her complaint to the doctor, then to Riya and the court affects the credibility of the complainant

because passage of time can affect memory and the age of the complainant at the time of the happening is an important factor in this regard.

118. I accept that it was the accused who had touched and/or fondled the breast of the complainant and penetrated her vagina with his finger on many occasions as alleged and on one occasion it was the accused who had penetrated the vagina of the complainant with his penis. The important point to note is that the complainant had told both the recent complaint witnesses and the court crucial information about the accused's sexual conduct on her.

119. I accept the evidence of the complainant as a truthful and reliable account of what the accused had done. I have also taken into account that it is not expected of a 12 year old child who has had an unexpected sexual encounter to tell anyone she meets every detail about what had happened to her.

120. The observations of the Supreme Court in *Anand Abhay Raj vs. The State*, CAV 0003 of 2013 (20th August, 2014) at paragraph 39 is crucial here:

The complainant need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence.

121. What the complainant told the doctor and Riya was material and relevant to the unlawful sexual conduct of the accused. The decisive aspect of the recent complaint evidence is to show consistency of the complainant's conduct with her evidence given at trial. In *Raj's* case (supra) the Supreme Court at paragraphs 37 and 38 stated the following about recent complaint evidence:

[37] Procedurally for the evidence of recent complaint to be admissible, both the complainant and the witness complained to, must testify as to the terms of the complaint: Kory White v. The Queen [1998] UKPC 38; [1999] 1 AC 210 at p215H. This was done here.

[38] The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.

LESSER OFFENCE

122. I have also directed my mind to the lesser offences of indecent assault in respect of the two counts sexual assault the accused is charged with. The law provides that when a person is charged with an offence and the court is of the opinion that he is not guilty of that offence but guilty of a lesser offence, the court may find the accused guilty of that lesser offence. In this regard, I direct myself that if this court finds the accused not guilty of sexual assault then it should consider the lesser offence of indecent assault.

123. I have once again carefully examined the evidence in respect of the two counts of sexual assault and I am satisfied that the touching and/or fondling of the complainant's breast over her clothes and then from

inside her clothes is not sexual in nature and therefore any right minded person would consider such conduct indecent only.

124. In the circumstances, this court is satisfied beyond reasonable doubt that there is evidence to sustain the charges of indecent assault and not sexual assault for the two counts in question.
125. In view of the above, the accused is found not guilty of the offences of sexual assault but guilty of the lesser offences of indecent assault.
126. Moreover, I reject the defence of denial by the accused as not plausible on the totality of the evidence. The defence assertion that the accused had not done anything to the complainant is unworthy of belief.
127. The accused did not tell the truth he gave a version of events which is not believable. The accused did not tell the truth in court when he said he never used to come home during the day when he had told the police in his caution interview when facts were fresh in his mind that he used to come home during the day. The accused also did not tell the truth when he told the court that the complainant used to go to town with her sisters whereas in his caution interview he had told the police that the complainant used to stay at home while her sisters went to town.
128. I do not believe the accused when he said that he did not do anything to the complainant and that the allegations are a concocted story by the complainant.
129. I do not give any weight to the evidence of the accused who was not forthcoming and was diverting attention away from the allegations drawing the picture of a hardworking and dedicated father who has been

falsely targeted by his daughter who he had brought up and cared for her after the death of his wife.

130. The defence has not been able to create a reasonable doubt in the prosecution case in respect of the two counts of indecent assault and two counts of rape as charged.

CONCLUSION

131. This court is satisfied beyond reasonable doubt that the accused on between 1st February, 2019 and 28th February, 2019 and between 1st March, 2020 and 31st March, 2020 had unlawfully and indecently assaulted the complainant by touching and/or fondling her breast. This court is also satisfied beyond reasonable doubt that the accused had acted unlawfully that is without lawful excuse in what he did to the complainant. The act of the accused has some elements of indecency that any right minded person would consider such conduct indecent in nature.
132. This court is also satisfied beyond reasonable doubt that the accused between 1st February, 2019 and 28th February, 2019 had penetrated the vagina of the complainant with his finger and between 1st March, 2020 and 31st March, 2020 the accused had penetrated the complainant's vagina with his penis and on all occasions the complainant was under 13 years of age.
133. In view of the above, I find the accused guilty of two counts of indecent assault being lesser offence for counts one, and four and two counts of rape being counts two and seven and he is convicted accordingly. Due to

lack of evidence the accused is acquitted of two counts of rape being counts three and five and one count of sexual assault being count six.

134. This is the judgment of the court.

Sunil Sharma
Judge

At Lautoka

07 June, 2024

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs Fazilat Shah Legal for the Accused.